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No. 03-1083

IN THE

Supreme Court of the United States

ST. VINCENT MEDICAL CENTER; DAUGHTERS OF CHARITY HEALTH SYSTEMS, INC.,
Petitioners,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION; SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 399,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals correctly determine that the district court had jurisdiction to enforce the parties' contractual agreement to arbitrate disputes regarding an alleged breach of the parties' agreement?

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BRIEF IN OPPOSITION

STATEMENT

The issue resolved by the court of appeals in this case is the arbitrability of disputes arising out of a private labor agreement. The Petitioner, St. Vincent Medical Center ("Petitioner" or "Employer"), and Respondent, Service Employees International Union ("Respondent" or "Union"), contractually agreed to abide by certain ground rules during organizing campaigns, and agreed that disputes over compliance with these restrictions would be submitted to arbitration.

Following a representation election conducted by the National Labor Relations Board ("NLRB" or "Board"), the Union alleged that the Employer's conduct during the organizing campaign violated the parties' agreement, and sought to arbitrate these violations. The court of appeals held

that because the Union's allegations concerned only contractual violations of the parties' agreement, the Union was entitled to an order compelling arbitration.

In arguing for a grant of *certiorari*, Petitioner miscasts and mischaracterizes the court of appeals' holding. Contrary to Petitioner's contention, the Union did not attack the results of the Board-conducted election, and the court of appeals did not compel arbitration of challenges to the results of that election. Indeed, the court of appeals' holding confirms, as all parties agree, that a suit brought under § 301 of the Labor Management Relations Act is not the proper vehicle for challenging the results of an NLRB election.

The court of appeals' conclusion that the district court had jurisdiction to order arbitration of a contractual dispute regarding pre-election conduct is wholly consistent with the clear law of this Court and with circuit court precedent. Indeed, the two circuits that have examined the question presented here reached the same conclusion: that the district court had jurisdiction to enforce the agreements at issue and that the Union was entitled to an order compelling arbitration. No court of appeals has ever reached a contrary result. The petition should be denied.

ARGUMENT

I. THE NINTH CIRCUIT PROPERLY DETERMINED THAT THIS CASE INVOLVES ONLY CONTRACTUAL ISSUES AND THAT THE DISTRICT COURT ACCORDINGLY HAD JURISDICTION TO COMPEL ARBITRATION

Petitioner's argument for *certiorari* is based on its contention that the court of appeals held that "a labor union may compel private arbitration of election objections to a National Labor Relations Board (NLRB) conducted representation election." Pet. i; *see also* Pet. 17 (asserting that court of appeals "authoriz[ed] an order compelling arbitration of

objections to an NLRB-conducted election"). Fatal to Petitioner's argument, however, is the fact that the court of appeals did not reach this holding. Indeed, the court of appeals could not have reached the holding suggested by Petitioner (or "authorized" the order suggested by Petitioner) because, as the court of appeals concluded, the Union did not challenge the results of the Board election. The court of appeals stated explicitly that:

> [T]he Union is objecting to the behavior of the Employer in violation of the Guidelines that the parties agreed upon to govern their conduct during the organizing and pre-election drive. . . . *[T]he Union is not objecting to the end result of the election, or attempting to invalidate the results of the election. But rather, the Union is attempting to arbitrate "[t]hese objections [that] consisted of a series of allegations that [Petitioner] violated the [parties'] Agreement."*

Pet. App. 19a n.7 (emphasis added).[1]

Because the Union sought to arbitrate contractual violations covered by an arbitration clause, and did not attack the results of the Board election, the court of appeals reached the entirely unremarkable conclusion that under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), the district court had jurisdiction to compel arbitration. Pet. App. 17a; *see AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) ("*AT&T*") (internal citations omitted) ("[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that [an] order to

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[1] The court of appeals appropriately dismissed Petitioner's semantic argument that the Union's allegations of contractual breach—based on the Employer's pre-election conduct—necessarily challenged the results of the Board election by observing that "[r]egardless of the technical label, the Union is objecting to the behavior of the Employer in violation of the Guidelines that the parties agreed upon to govern their conduct during the organizing and pre-election drive." Pet. App. 19a n.7.

arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.").

Petitioner's argument for *certiorari* accordingly reduces to its claim that the Ninth Circuit mischaracterized the Union's complaint. As Petitioner put it, "[i]n finding that the [Union's] Complaint to Compel Arbitration of its election objections did not raise a 'primarily representational' issue, the Ninth Circuit chose to characterize that Complaint as seeking nothing more than the arbitration of contractual 'violations of the Agreement.'" Pet. 15.

The court of appeals correctly read the Union's complaint, but regardless of whether the court of appeals was correct in how it "chose to characterize" the complaint, the court of appeals' holding remains the same: when the allegations in a motion to compel arbitration concern contractual violations of a private agreement, a district court must enforce the agreement to arbitrate so long as the arbitration clause covers the asserted dispute. This holding—the one actually reached by the court of appeals—is unassailable, and the question of whether the court of appeals construed the Union's complaint correctly is unworthy of this Court's consideration.

Contrary to Petitioner's characterization of the Ninth Circuit's holding, moreover, the court of appeals held that a § 301 suit is *not* an appropriate vehicle for challenging the results of a union representation election conducted by the NLRB. Indeed, the Ninth Circuit applied the well-settled rules that courts "must defer to the NLRB 'when, on close examination, section 301 cases fall within the NLRB's primary jurisdiction,'" and that "[t]o determine whether a case is within the NLRB's primary jurisdiction, 'we have drawn the jurisdictional line by asking whether the major issues to be decided . . . can be characterized as primarily

representational or primarily contractual.'" Pet. App. 14a (quoting *United Ass'n of Journeymen v. Valley Eng'rs*, 975 F.2d 611, 613-14 (9th Cir. 1992); *Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1157 (9th Cir. 2000) (internal citations omitted)).

The court of appeals concluded correctly that the case at bar is "primarily contractual" not "primarily representational." Relying on its earlier decision in *Hotel & Restaurant Employees Union v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992), the court explained:

> Just as in *Marriott*, the district court in the present case will not be required to designate . . . an exclusive bargaining agent or identify . . an appropriate collective bargaining unit. Nor will the district court be required to resolve any other representational issues not already resolved by the parties. Rather, the district court in the present case would merely be required to determine whether the arbitration clause in the Agreement is susceptible of an interpretation that covers the asserted dispute, and if so to compel arbitration. Compelling arbitration of the alleged contractual violations will not require the naming of an exclusive bargaining agent or a collective bargaining unit.

Pet. App. 15a-16a (internal citations omitted). The court of appeals accordingly held that "[t]he heart of th[is] case is a contractual rather than a representational dispute," and that "compelling arbitration of the alleged violations of the Agreement . . . raises no representational issues." Pet. App. 16a (internal citations omitted). Because the issue in the case at bar is contractual, the court of appeals correctly determined that the district court had § 301 jurisdiction to enforce the arbitration clause.[2]

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[2] Petitioner's reliance on *Tyler Pipe Industries, Inc.*, 180 NLRB 880 (1970), is misguided. The fact the Board might, in adjudicating election objections brought before it, consider a party's failure to comply with a

II. THE NINTH CIRCUIT DECISION IS CONSISTENT WITH THE LAW OF ITS SISTER CIRCUITS

Petitioner contends that the court of appeals' decision in the instant case conflicts with the decisions of other courts of appeals. Pet. 11. The contention is entirely without merit and, indeed, Petitioner does not even cite the one circuit court decision on all fours with the case at bar. In *New York Health and Human Serv. Union, 1199/SEIU v. NYU Hospitals Center*, 343 F.3d 117, 119 (2d Cir. 2003) ("*NYU*"), the Second Circuit held that arbitration agreements identical in all relevant respects to the one at issue in the instant case are enforceable where the Board conducts the representation election.

In *NYU*, as here, the union and the employer entered into a private agreement regulating campaign conduct and providing for arbitration of alleged violations of the agreement. *See id.* at 118. Following a representation election conducted by the Board, the union sought to arbitrate whether the employer's pre-election campaign conduct violated the agreement. The Second Circuit held that the district court had jurisdiction to enforce the arbitration clause. *See id.* at 119-20. The *NYU* court specifically rejected the employer's argument that the Board's involvement in conducting the representation election deprived the district court of jurisdiction to compel

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private agreement, in no way alters the fact the allegations *in this case* concerned violations of a private agreement and did not attack the results of the Board-conducted election. Moreover, the section of *Tyler Pipe* relied on by Petitioner is dicta from a portion of the Administrative Law Judge's decision that was never reviewed by the Board. Under Board law, unreviewed determinations by an Administrative Law Judge have no precedential value. *See, e.g.*, *Colgate-Palmolive*, 323 NLRB 515, 515 n.1 (1997).

arbitration. *Id.* at 119 (citing *Hotel & Restaurant Employees Union Local 217 v. J.P. Morgan Hotel*, 996 F.2d 561 (2d Cir. 1993)).

Petitioner also fails to point to a single circuit court decision that conflicts with the court of appeals' decision here. Instead, Petitioner cites decisions from other circuits merely for general propositions of law. Pet. 12 (citing *Local Union 257, Intern. Broth. of Elec. Workers v. Sebastian Elec.*, 121 F.3d 1180, 1185 (8th Cir. 1997) ("*Sebastian Electric*") (for the proposition that "'[r]epresentational issues fall within the NLRB's primary jurisdiction'"); *Communications Workers of America v. U.S. West Direct*, 847 F.2d 1475, 1479 n.1 (10th Cir. 1988) ("*U.S. West*") (for the proposition that "if case is 'primarily representational,' Section 301 jurisdiction is precluded"); *United Bhd. of Carpenters, Local Union No. 1694 v. W.T. Galliher & Bros.*, 787 F.2d 953, 954 (4th Cir. 1986) ("*W.T. Galliher*") (for the proposition that "jurisdiction under Section 301 is precluded if the contractual dispute is 'primarily representational'"); *Local Union 204 of Int'l Bhd. of Elec. Workers v. Iowa Elec. Light & Power Co.*, 668 F.2d 413, 418-19 (8th Cir. 1982) ("*Iowa Electric*") ("same")). The Ninth Circuit, of course, applied precisely these jurisdictional rules in the case at bar. *See* Pet. App. 14a ("[t]o determine whether a case is within the NLRB's primary jurisdiction, we have drawn the jurisdictional line by asking whether the major issues to be decided . . . can be characterized as primarily representational or primarily contractual") (internal citations omitted).

Strikingly, in *Sebastian Electric*, *U.S. West*, and *W.T. Galliher*, the Eighth, Tenth, and Fourth Circuits all found the disputes before them to be primarily contractual and either ordered arbitration or enforced the arbitration awards at issue. *See Sebastian Elec.*, 121 F.3d at 1186 ("the issues in the present case are primarily contractual"); *U.S. West*, 847 F.2d 1476 ("U.S. West claims that the union grievance raises a

question of representation which should be decided by the [NLRB]. We disagree."); *id.* at 1479 n.1 ("in the instant case . . . the representational issue is collateral to the contract dispute"); *W.T. Galliher*, 787 F.2d at 954 ("We do not believe that this dispute can be characterized as so 'primarily representational' as to preclude section 301 jurisdiction."). And in *Iowa Electric*, while the Eight Circuit held that the district court there lacked § 301 jurisdiction over the dispute before it, the court of appeals explicitly distinguished that case from cases, like the one at bar, involving suits to compel arbitration. 668 F.2d at 419 ("*Carey* [*v. Westinghouse Elec. Corp.*, 375 U.S. 261 (1964)] has been consistently interpreted to support district court jurisdiction under section 301 of the LMRA over suits to compel arbitration of a representational dispute where the parties have agreed under the collective bargaining agreement to arbitrate such matters.").

In sum, the court of appeals' decision here is entirely consistent with the law of its sister circuits. Petitioner's assertion of a conflict is meritless.

III. THE QUESTION OF REMEDIES IS NOT BEFORE THE COURT IN A MOTION TO COMPEL ARBITRATION

Petitioner asserts that the order compelling arbitration in the instant case is inappropriate because "the ultimate issue before the arbitrator will be whether the employees' vote in the NLRB election rejecting union representation should stand or be re-run." Pet. 17. As an initial matter, and again, the court of appeals correctly concluded that the Union here did not challenge the results of the Board election and, in any event, the arbitrator simply does not have authority to set aside the results of an election conducted by the NLRB. More fundamentally, the "ultimate issue" of remedies is not, as a matter of clearly established law, before the district court in a suit to compel arbitration. As this Court has explained, in

a suit to compel arbitration the only question for the district court is whether the arbitration clause is "susceptible of an interpretation that covers the asserted dispute." *AT&T*, 475 U.S. at 650.

More specifically, as this Court and the courts of appeals have made clear, the theoretical potential for a conflict between Board action and an arbitral remedy can not, as a matter of law, serve to bar an order compelling arbitration. This Court stated the rule in *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964) ("*Carey*"), writing that while arbitral awards "may later end up in conflict with Board rulings . . . the possibility of conflict is no barrier to resort to a tribunal other than the Board." Relying on *Carey*, the Ninth Circuit held in *Hospital & Institutional Workers Union, Local 250 v. Marshal Hale Memorial Hosp.,* 647 F.2d 38, 42 (9th Cir. 1981) that:

> [A]ny conflict between the NLRB and an arbitrator is necessarily speculative when the arbitrator has yet to rule. . . . Conflicts between the arbitrator and the NLRB can be resolved when they become manifest in an action to enforce the award. The mere possibility of conflict, however, is no barrier to arbitration.

(internal citations omitted); *see also Sheet Metal Workers Int'l Ass'n, Local No. 162 v. Jason Mfg.*, 900 F.2d 1392, 1400 (9th Cir. 1990). The Second, Fourth, and Fifth Circuits have all announced the same rule. *See United Food & Commercial Workers Union, Local 400 v. Shoppers Food Warehouse, Corp.*, 35 F.3d 958, 962 (4th Cir. 1994) (adopting rule of sister circuits that "until an arbitrator has ruled, there is not a direct and immediate conflict . . . . [a]nd in the absence of such a conflict, the arbitration clause should be enforced"); *Truck Drivers Local 807 v. Regional Import & Export*, 944 F.2d 1037, 1047 (2d Cir. 1991) ("The mere possibility that the eventual arbitration award may conflict with the Board's ruling is not a cognizable basis for refusing to compel

arbitration."); *Lodge 37, IAM v. Boland Marine & Mfg. Co.*, 591 F.2d 1184, 1187 (5th Cir. 1979) ("[I]t is not for this Court to look at what the outcome of arbitration of (the Union) grievance might be in view of the NLRB's decision; our duty is simply to look at the labor agreement and determine whether this is the sort of question which is covered by the arbitration.").[3]

IV. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE STIPULATED ELECTION AGREEMENT DID NOT BAR ARBITRATION

Lastly, Petitioner contends that court of appeals erred by "dismissing the binding effect of the NLRB Stipulated Election Agreement" which stated that "postelection and runoff procedures . . . after the ballots are counted shall conform with the Board's Rules and Regulations." Pet. 19. Petitioner points specifically to Board regulations requiring post-election objections challenging the results of Board elections to be filed with the Board within seven days of that election, 29 C.F.R. § 102.69(a), and regulations stating that the Board will adjudicate such objections. 29 C.F.R.

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[3] Respondent does not concede the existence of a potential arbitral award that would conflict with the Board's certification of the results of the election it conducted. First, the arbitrator clearly lacks the authority to disturb the Board's certification of these election results. Second, the National Labor Relations Act's one-year bar on representation elections has run and the Act itself would now permit a new election. *See* 29 U.S.C. § 159(c)(3). Finally, there is quite obviously a wide range of arbitral remedies that would in no conceivable way conflict with the Board's action here (*e.g.*, an order that Petitioner post a notice stating that its pre-election conduct violated the parties' agreement, or an order that Petitioner reimburse the Union for expenses incurred during the organizing campaign.) But, as we have demonstrated, the potential remedies that the arbitrator might order are not at issue in this case. *See, e.g.*, *Carey*, 375 U.S. at 272; *Hospital & Institutional Workers*, 647 F.2d at 42.

§ 102.69(c)-(f). As is clear on the face of these regulations, however, they apply to objections *filed with the Board* regarding challenges to the results of Board elections. Again, as the court of appeals correctly concluded, the Union here did not challenge the results of the Board-conducted election. Pet. App. 19a n.7. Accordingly, regulations regarding such challenges are inapposite and do not bar arbitration of the Union's claims that the Petitioner violated the private agreement.

An identical Stipulated Election Agreement was at issue in the *NYU* case, and there, as here, the employer argued that the stipulation acted as a bar to arbitration. Like the court of appeals here, the Second Circuit in *NYU* held that the stipulation was no bar to arbitration. 343 F.3d at 119-20. In reaching this holding, the Second Circuit explicitly rejected the employer's argument that *Grant's Home Furnishings, Inc.*, 229 NLRB 1305 (1977), dictates a different result. *See id.* at 120. *Grant's Home Furnishings* is the sole case relied on by Petitioner here. Pet. 18-20.[4]

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[4] Petitioner's final argument, that the court of appeals' holding is a "collateral attack" on the results of the Board election, Pet. 21, is a repackaging of its primary argument that the court's holding "authoriz[es] an order compelling arbitration of objections to an NLRB-conducted election," Pet. 17, and suffers from the same flaw. The court of appeals' decision does not amount to an attack, collateral or otherwise, on the Board election because, as the court of appeals explained, "the Union is not objecting to the end result of the election or attempting to invalidate the results of the election." Pet. App. 19a n.7.

CONCLUSION

For the above-stated reasons, the petition should be denied.

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